Supreme Court, U.S.
FILED

03 1166 JUL 29 2003

OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

APACHE BOHAI CORPORATION, LDC,

Petitioner,

v.

TEXACO CHINA, B.V.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROXANNE ARMSTRONG
APACHE CORPORATION
2000 Post Oak Blvd.
Suite 100
Houston, Texas 77056-4400
(713) 296-6501

WM. B. WAGNER
MARCY HOGAN GREER*
MARC B. COLLIER
FULBRIGHT & JAWORSKI L.L.P.
600 Congress Avenue
Suite 2400
Austin, Texas 78701
(512) 474-5201

Counsel for Petitioner

* *Counsel of Record*

181325

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

In *Green Tree Fin. Corp. v. Randolph*,[1] the Court held that a district court could enter a final and appealable judgment once it had compelled all pending claims to arbitration. The Court indicated that it was not then deciding whether a stay or dismissal was the proper course.[2] The question presented by this case is whether and under what circumstances a district court has the authority to stay, rather than dismiss, the proceedings even though its decision on arbitrability disposes of all claims and parties and effectively "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."[3]

---

1. 531 U.S. 79 (2000).

2. *Id.* at 87 n.2.

3. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

PARTIES TO PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit (the court whose judgment is sought to be reviewed) are: Apache Bohai Corporation, LDC—appellant and petitioner in the Fifth Circuit, plaintiff in the district court below, and respondent (defendant) in the related arbitration; and Texaco China B.V.—appellee and respondent in the Fifth Circuit, defendant in the district court, and claimant in the related arbitration. Apache China Corporation, LDC was not a party in the proceedings below, but is a respondent (defendant) in the related arbitration.

CORPORATE DISCLOSURE STATEMENT

Apache Overseas, Inc. is the parent corporation of Apache Bohai Corporation, LDC and Apache China Corporation, LDC, and is not a party to any of the proceedings; Apache Corporation, is the parent corporation of Apache Overseas, Inc., and is not a party to any of the proceedings.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to Proceeding	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provision Involved	1
Statement of the Case	1
Reasons for Granting the Petition	6
I. Inconsistencies Among the Circuit Courts of Appeal and the District Courts Already Exist	7
II. Authority of the District Courts	12

Contents

Page

A. Section 16 Carefully Preserves the Distinction Between Interlocutory and Final Decisions on Arbitrability 12

1. The term "final decision" has a longstanding meaning 15

2. The legislative history of section 16(a)(3) confirms this reading 16

3. Treating a "final decision" as final poses no threat of piecemeal appeals 18

B. Should District Courts Serve As Appellate Gatekeepers And Have The Power To Insulate Their Decision From Scrutiny? 20

III. At a Minimum, District Courts Must Be Given Parameters for Making the Finality Determination 24

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Alford v. Dean Witter Reynolds, Inc.,
975 F.2d 1161 (5th Cir. 1992) 15, 19

Am. Heritage Life Ins. Co. v. Orr,
294 F.3d 702 (5th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 871 (2003) 11, 21, 22

Arnold v. Arnold Corp.—Printed Communications for Bus.,
920 F.2d 1269 (6th Cir. 1990) 15, 18

ATAC Corp. v. Arthur Treacher's, Inc.,
280 F.3d 1091 (6th Cir. 2002) 9, 10

Bercovitch v. Baldwin Sch., Inc.,
133 F.3d 141 (1st Cir. 1998) 19

Blair v. Scott Specialty Gases,
283 F.3d 595 (3d Cir. 2002) 9

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988) 15

Buffler v. Elec. Computer Programming Inst.,
466 F.2d 694 (6th Cir. 1972) 16

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 15

Cited Authorities

Page

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) ..... i, 15, 18

Dustrol v. Champagne-Webber,
No. Civ. A3:01-CV-0650-G, 2002 WL 122500
(N.D. Tex. Jan. 4, 2002) 11, 12, 23

Employers Ins. of Wausau v. Bright Metal Specialties, Inc.,
251 F.3d 1316 (11th Cir. 2001) 8

Fedmet Corp. v. M/V Buyalyk,
194 F.3d 674 (5th Cir. 1999) 19

Green Tree Fin. Corp. v. Randolph,
531 U.S. 79 (2000) ..... *passim*

Hill v. G E Power Sys., Inc.,
282 F.3d 343 (5th Cir. 2002) 20

John Hancock Mut. Life Ins. Co. v. Olick,
151 F.3d 132 (3d Cir. 1998) 15

Jurecski v. Banc One Texas, N.A.,
252 F. Supp. 2d 368 (S.D. Tex. 2003) 10, 11, 12

Landreth Timber Co. v. Landreth,
471 U.S. 681 (1995) 22

Liberty Mut. Ins. Co. v. Wetzel,
424 U.S. 737 (1976) 24

Cited Authorities

Page

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 12

Moses A. Cone Mem. Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 3

Napleton v. General Motors Corp.,
138 F.3d 1209 (7th Cir. 1998) 16, 21

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996); 18

Richardson-Merrell Inc. v. Koller,
472 U.S. 424 (1985) 18

Salim Oleochemicals v. M/V Shropshire,
278 F.3d 90 (2d Cir. 2002) 9

Sea-Land Serv., Inc. v. Sea-Land of P.R., Inc.,
636 F. Supp. 750 (D. Puerto Rico 1986) 11, 19

Sullivan v. Finkelstein,
496 U.S. 617 (1990) 24

United States v. Lee,
786 F.2d 951 (9th Cir. 1986) 24

United States v. Ron Pair Enters, Inc.,
489 U.S. 235 (1989) 22

Zosky v. Boyer,
856 F.2d 554 (3d Cir. 1988) 16

Cited Authorities

Page

Statutes:

9 U.S.C. § 1, *et seq* 3

9 U.S.C. § 16(a)(3) ..... *passim*

9 U.S.C. § 16(a)(A)-(C) 14

9 U.S.C. § 201 *et seq.* 3

9 U.S.C. § 205 *et seq.* 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 ..... 15, 18

28 U.S.C. § 1292(b) 11, 23

Rules:

FED. R. CIV. P. (54)(b) 23

Cited Authorities

Page

Other Authorities

Edith H. Jones, *Appeals of Arbitration Orders—Coming Out of the Serbonian Bog*, 31 S. Tex. L. Rev. 361(1990) 16

16 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3920 24

Gas Sector Jargon Buster, ENERGYWEB.NET 1

134 Cong. Rec. at S 16284 (1988) 17

134 Cong. Rec. at S 16309 (1988) 17

Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, Title X, § 1019(a), 102 Stat. 4671 (1988) 17, 18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed April 30, 2003 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Southern District Of Texas, Houston Division Dated March 26, 2002 And Entered March 27, 2002 ..... 9a

Appendix C — Relevant Statute 35a

Plaintiff-appellant Apache Bohai Corporation ("Bohai") files this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's order is unpublished and was rendered in Civil Action No. H-01-2019, *Apache Bohai Corporation, LDC v. Texaco China, B.V.*, in the United States District Court for the Southern District of Texas, Houston Division. *See* App. at 9a. The opinion of the court of appeals was handed down in *Apache Bohai Corporation, LDC v. Texaco China, B.V.*, 330 F.3d 307 (5th Cir. 2003). *See* App. at 1a.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit sought to be reviewed in this case was entered on April 30, 2003. This Court has jurisdiction under 9 U.S.C. § 16(a)(3) and 28 U.S.C. § 1254(1) to review the court of appeals' decision, dismissing the appeal for lack of appellate jurisdiction and denying mandamus relief.

STATUTORY PROVISION INVOLVED

9 U.S.C. § 16(a)(3) (*See* App. at 35a.)

STATEMENT OF THE CASE

This case arises out of two farmin agreements (the "Farmin Agreements" or "Farmins")[4] that were originally made between

4. A farmin agreement is generally a contract in which "one company acquires an interest in an exploration or production license by paying some of the past or future costs of another company which is relinquishing part of its interest." *Gas Sector Jargon Buster*, EnergyWeb.Net.

Apache China[5] and Texaco China, B.V. ("Texaco") to facilitate petroleum exploration and production in an offshore area of the People's Republic of China. The principal issue in the district court proceedings related to the arbitration clause contained in these agreements.

Between 1992 and 1996, Texaco had entered into two production sharing contracts ("Petroleum Contracts") with the Chinese government to develop natural resources in two designated acreage blocks in the Bohai Bay area of the People's Republic of China in return for a share of the proceeds. The Petroleum Contracts permitted Texaco (and its assigns and partners) to explore for, develop and produce natural resources in the two blocks for a percentage of the revenues from those blocks.

Texaco in turn entered into the Farmins with Apache China, under which Apache China would drill various wells at Apache China's cost and develop these blocks pursuant to the agreements in exchange for 50 percent of Texaco's interest in the blocks or concessions.

Several months after it was assigned the 50 percent interest, Apache China transferred all of its rights and obligations under the Farmins to Petitioner Bohai. Subsequently, Bohai decided it did not want to proceed further in developing the blocks and offered to reassign its interests to Texaco. On or before January 12, 2000, Texaco accepted this reassignment.

On January 9, 2001, approximately one year after it accepted the reassignment, Texaco filed a demand for

5. Apache China and Bohai are two separate corporate entities, although they are affiliated.

arbitration against Apache China for its failure to drill the wells under the Farmins. Inexplicably, this demand sought arbitration only against Apache China, which was no longer a party to the contracts and had no obligations under them after December 1998 when the Chinese governmental entities formally accepted Bohai as the replacement for Apache China. Nonetheless, Texaco's arbitration demand asserted that Apache China (not Bohai) had breached its obligations under the Farmins by failing to drill the specified wells.

On May 16, 2001, Bohai, which was not a party to the arbitration, filed in Texas state court[6] an original petition and request for declaratory relief that the Farmins had terminated, that Bohai had no liability to Texaco, and that the dispute was no longer subject to arbitration because the arbitration provisions in the Farmins had terminated prior to the filing of Texaco's demand. By letter dated May 25, 2001, Texaco purported to add Bohai to the existing arbitration proceeding.

Texaco then removed the state court suit filed by Bohai to federal court based on alleged federal subject matter jurisdiction arising out of the Federal Arbitration Act ("FAA")[7] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[8] Texaco also filed a motion to compel

---

6. This suit was filed in state court because there was no diversity, and the provisions of the FAA do not provide a basis for federal jurisdiction over these claims. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). On the other hand, the FAA, 9 U.S.C. § 205, does allow for removal of the arbitration issues here.

7. 9 U.S.C. § 1, *et seq.*

8. Codified at 9 U.S.C. § 201, *et seq.*

arbitration, invoking the arbitration provisions of the Farmin Agreements.

Bohai responded that the dispute was no longer subject to arbitration since Texaco had accepted the reassignment that terminated the Farmin Agreements and all their provisions (including the arbitration provision) except one relating to confidentiality. Bohai pointed out that the Farmins provided for termination upon reassignment and that only one provision of the Farmins—not the arbitration provision—was expressly intended to survive termination. In addition, Bohai informed the district court that joint operating agreements had been executed by the parties at the same time as the Farmins as part of the same transaction. Significantly and in contrast to the provisions of the Farmins, each of these operating agreements contained an arbitration provision that expressly provided for survival of the arbitration obligation: "[t]he right to arbitrate disputes, controversies or claims . . . shall survive the termination of th[e JOA]."

In the courts below, Bohai acknowledged that the dispute over the drilling of the wells would be subject to arbitration had there been a live agreement to arbitrate in effect when Texaco filed its demand; however, when Texaco accepted reassignment of the Farmins, it allowed the Farmins (including the arbitration agreement/provision) to terminate according to their own terms, leaving only one provision—again not including the arbitration provision—to survive. Texaco, by choosing whether and when to accept the reassignments, thus determined if and importantly when the Farmins (and the arbitration provisions) would terminate.

In a March 27, 2002, opinion, the district court agreed with Texaco that the entire dispute should be sent to

arbitration pursuant to the FAA. *See* App. at 31a. The district court acknowledged that the arbitration decision effectively ended the litigation before it, as all pending claims had been referred to arbitration. The district court refused to dismiss the case—as Bohai had requested—instead purporting to "stay" the case for the express purpose of preventing an appeal. App. at 33a-34a. Specifically, the district court considered this decision to compel arbitration of all pending claims to be a "final decision," but decided that "[d]espite this, the Court finds that dismissal is inappropriate in this case" because, in its view, "further appellate review would substantially delay the resolution of the parties' dispute through arbitration." *Id.* at 33a-34a.

Bohai timely filed a notice of appeal from the decision and also filed a mandamus, invoking the Fifth Circuit's original jurisdiction to set aside the so-called "stay" order in the event it found it lacked appellate jurisdiction over the appeal. After entertaining briefing and oral argument, the court of appeals dismissed the appeal for want of appellate jurisdiction and denied the mandamus. *See Apache Bohai Corp., LDC v. Texaco China, B.V.*, 330 F.3d 307 (5th Cir. 2003). App. at 1a.[9]

---

9. In view of the timing of the arbitration final hearing, Bohai chose not to seek rehearing of the Fifth Circuit's decision. At that point, the arbitration hearing was set for November 4, 2003. It has now been rescheduled for January 13, 2004.

REASONS FOR GRANTING THE PETITION

This case presents an ideal opportunity for the Court to address not only the question left open in its decision in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), but also to resolve the inconsistencies that this Court's open question has spawned. This lack of uniformity is of particular concern since section 16 of the FAA was adopted to bring consistency and predictability to the appealability of arbitration decisions.

Just as *Green Tree* was important to arbitral jurisprudence, so too are the issues here since they apply to any party or case having an arbitration provision subject to the FAA, including the New York Convention. As such, these issues affect both domestic and international arbitration matters and impact directly the foreign entities who are brought before the courts of the United States. Consequently, the issues here also implicate the international community's perception of the United States judicial system.

In *Green Tree*, the Court held that an order compelling arbitration and entering a final decision was final and appealable under the FAA, 9 U.S.C. § 16(a)(3). In footnote 2 of that opinion, the Court reserved for later decision the very question presented here:

> Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable. ***The question whether the District Court should have taken that course is not before us, and we do not address it.***

Green Tree, 531 U.S. at 87 n.2 (citing 9 U.S.C. § 16(b)(1)) (emphasis added). The Court made clear in *Green Tree* that

a district court ***can*** enter a final and appealable decision once it has disposed of the claims before it in an order compelling arbitration. Now the Court is requested to provide the much needed guidance as to whether and under what circumstances a district court ***should*** enter a final and appealable order or decision.

Having resolved a split in the circuits in *Green Tree*, inconsistent interpretations of footnote 2 in *Green Tree* have occurred, and a new controversy has taken root and is growing. The fundamental policy determination to be made is whether it is permissible or desirable for the district courts to serve as gatekeepers—not as to arbitrability issues, but as to appellate review of their own decisions on arbitrability. Put another way, can the district courts effectively shield or insulate their decisions from appellate review by artificially naming the form of the order a "stay" rather than a "dismissal"—even when there is nothing left of the case to "stay"? The court of appeals' decisions deferring to such district court labels serve little or no purpose other than to encourage disparate results, the very antithesis of the purpose behind the enactment of section 16 of the FAA.

I. Inconsistencies Among the Circuit Courts of Appeal and the District Courts Already Exist

In the instant case, the Fifth Circuit made clear that, in making the threshold decision on its appellate jurisdiction over an arbitration decision, it will accept at face value the district court's label of "stay" or "dismissal," rather than independently determine which procedural vehicle (stay or dismissal) was appropriate. The reasoning for the decision

is the Fifth Circuit's belief that this Court's statements in footnote 2 in *Green Tree* did not leave any issues open:

> In *Green Tree*, 531 U.S. at 87 n.2, the Court noted that had the district court entered a stay rather than a dismissal, the order would have been unappealable. Thus, even where dismissal is appropriate, *i.e.*, all claims have been referred to arbitration, the entry of a stay rather than a dismissal bars appellate jurisdiction.

330 F.3d at 309 n.4. Simply stated, the Fifth Circuit reads this Court's comments to provide a district court with the absolute and essentially unreviewable power to issue a stay in any situation for any reason or for no reason whatsoever.

The Eleventh Circuit has taken the same approach as the Fifth Circuit based upon a similar view that footnote 2 in *Green Tree* does not leave an open question. *See Employers Ins. of Wausau v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1322 n.6 (11th Cir. 2001) ("[T]he district court could have, but did not, stay the case pending arbitration."); *see also Green Tree*, 531 U.S. at 87 n.2 (explaining that arbitration order staying rather than dismissing all other claims for relief "would not be appealable").

The mechanical approaches of the Fifth and Eleventh Circuits mirror the one the Second Circuit appears to espouse—*e.g.*, deferring to the district court's label:

> We urge district courts in these circumstances to be as clear as possible about whether they truly intend to dismiss an action or grant a stay. . . . Courts should be aware that a dismissal renders

> an order appealable under § 16(a)(3), while the granting of a stay is an unappealable interlocutory order under § 16(b).

Salim Oleochemicals v. M/V Shropshire, 278 F.3d 90, 93 (2d Cir. 2002).

In contrast to the foregoing, the Third Circuit would appear to agree with Bohai that footnote 2 did not decide the issue at hand—*i.e.*, that this Court did not address in *Green Tree* "whether the district court should have entered a stay instead of a dismissal." *Blair v. Scott Specialty Gases*, 283 F.3d 595, 601 (3d Cir. 2002). In discussing the Court's distinction between stays and dismissals, the Third Circuit also noted that it had "no reason to assume that a district court will enter a stay rather than a dismissal when all the claims are arbitrable." *Id.* at 602 n.1. The case presented proves that supposition to be incorrect.

Yet another approach has arisen in the Sixth Circuit which agreed there was an open issue, acknowledging that this Court "did not address the relative merits of a district court's entering a stay instead of a dismissal." *ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091, 1101 n.6 (6th Cir. 2002). The Sixth Circuit then came up with its own standard that vests the district court with control over appealability of arbitration orders, providing the following "guidelines":

> [I]n cases where there is a ***genuine legal question*** concerning arbitrability a dismissal rather than a stay allows that question to be determined promptly on appeal. On the other hand, in the large majority of cases, the district court can speed along an arbitration about whose validity it thinks

> there is ***little legal dispute*** by staying the action rather than dismissing it.

Id. at 1101 (emphasis added). However, that court offered no guidance for deciding whether an arbitrability question is "a genuine legal question" or contains "little legal dispute." *Id.* Nor can any direction be found in the arbitration statute or jurisprudence.

Not surprisingly, even district courts within the same jurisdiction are coming to opposite conclusions in cases involving indistinguishable fact patterns. For example, the case at-hand was decided by the United States District Court for the Southern District of Texas, Houston Division. Despite the express acknowledgement that it had disposed of all claims and all parties by granting the motion to compel arbitration—and even though it indicated that the case probably should be dismissed—the district court here issued a stay.

In contrast, that same court (albeit a different judge) came to the exact opposite conclusion in ruling on a virtually identical set of facts. *See Jurecski v. Banc One Texas, N.A.*, 252 F. Supp. 2d 368 (S.D. Tex. 2003). In *Jurecski*, the district court, after compelling all claims before it to arbitration, dismissed the case and thereby allowed for an immediate appeal.[10] The district court in *Jurecski* did not seek to insulate

10. In a well-reasoned opinion thoroughly analyzing the controlling authorities, the district court reasoned:

> "This course of action will also make the arbitrability issue immediately appealable." Because there are no live controversies remaining in this action, the court

(Cont'd)

its decision from appeal; instead, it recognized that all the matters before it had been finally concluded and that a final judgment should be entered.

Similarly, in *Dustrol v. Champagne-Webber*, No. Civ. A3:01-CV-0650-G, 2002 WL 122500 (N.D. Tex. Jan. 4, 2002), the district court recognized that a final and appealable decision could and should be made after the claims on the merits had been compelled to arbitration. There, the original arbitration ruling did not dispose of all pending claims, and Dustrol, the party opposing arbitration, asked the court to certify its order compelling arbitration and staying the case under 28 U.S.C. § 1292(b) for an immediate appeal. Dustrol alternatively moved to amend its complaint to delete the other claims in the suit. 2002 WL 122500 at *4. The district court, after significant analysis, concluded the case did not qualify for certification under section 1292(b). However, it did permit Dustrol to amend its pleadings to remove the remaining claims so that a final decision could be entered—even though the district court was aware that the sole purpose of Dustrol's amendment was to achieve a final and appealable order on arbitration. *Id.* ("Therefore, as a result of this ruling [granting the motion to amend to remove a claim], the court dismisses this case because there are no longer any unadjudicated claims presently before the court." (citations omitted)).

(Cont'd)

concludes that it should dismiss plaintiff's claims without prejudice.

Jurecski v. Bank One Texas, N.A., 252 F. Supp. 2d 368, 380 (S.D. Tex. 2003) (citing and quoting, *inter alia*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 (2000); *American Heritage Life Insurance Co. v. Orr*, 294 F.3d 702, 707-08 (5th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 871 (2003); and *Sea-Land Serv., Inc. v. Sea-Land of P.R., Inc.*, 636 F. Supp. 750, 757 (D. Puerto Rico 1986)).

Had the present case been before either the *Dustrol* or *Jurecski* judges, Bohai's appeal could have been decided on the merits by the Fifth Circuit. Such incongruous results are precisely the opposite of what Congress sought to achieve by setting forth the clear rules for the appealability of arbitration decisions, as explained below at part II.A.2.

II. Authority of the District Courts

The question presented exemplifies the tension between federal policies regarding finality and arbitration. This Court has often expressed its view that arbitration is favored. *E.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). However, that proposition does not translate into an abiding principle that every order favoring or compelling arbitration should be insulated from immediate appeal. As will be demonstrated by the legislative history discussed below in part II.A.2, Congress fully intended to provide rights to those who are compelled to arbitration and to maintain the distinction between veritably interlocutory and final decisions in the context of arbitration orders. Interlocutory orders granting or denying stays are governed by very different standards—representing very different congressional policy decisions from those governing final decisions under section 16(a)(3).

A. Section 16 Carefully Preserves the Distinction Between Interlocutory and Final Decisions on Arbitrability

The framework of section 16, read in full context, demonstrates that interlocutory decisions and "final decisions" on arbitrability are covered by different rules regarding their amenability to appeal. Section 16, reprinted

in full, sets out varying, but quite deliberate, rules as to the appellate treatment of the various types of arbitration orders:

(a) ***An appeal may be taken from***—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) ***a final decision with respect to an arbitration that is subject to this title.***

> (b) Except as otherwise provided in section 1292(b) of title 28, ***an appeal may not be taken from an interlocutory order***—
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (emphasis added). The structure of this provision and language emphasized above makes clear that only ***interlocutory*** orders favoring arbitration are not appealable.[11] By contrast, "final decisions" on arbitrability—whether favoring or disfavoring arbitration— are immediately appealable. Section 16(a)(3) noticeably omits any distinction between pro-arbitration and anti-arbitration orders, making clear that any "final decision" as to arbitrability should continue to be treated as any other "final decision" for purposes of appeal.

---

11. The statute also makes interlocutory orders that are hostile to arbitrations immediately appealable. *E.g.*, 28 U.S.C. § 16(a)(1)(A)-(C).

1. The term "final decision" has a longstanding meaning

Because "final decision" is not specifically defined in the FAA, the Court has construed it in the same manner as the same term used in 28 U.S.C. § 1291. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 86-87 (2000). The jurisprudence under section 1291 has been refined over the years into a "well-developed and longstanding meaning." *Id.* at 86. Under this finality test, an order respecting arbitration is a "final decision" when it "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Green Tree*, 531 U.S. at 86 (citing, *inter alia*, *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994), and *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). The purpose of the rule is to provide "operational consistency and predictability in the overall application of § 1291." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). The questions raised here include the ability of the district court to utilize, and the authority of the appellate courts to review, an artificial label on a package that is otherwise a "final decision."

Some of the circuit courts have likewise recognized in the specific context of arbitration orders that a case is ripe for appeal "where there is nothing left to be done in the district court." *Arnold v. Arnold Corp.—Printed Communications for Bus.*, 920 F.2d 1269, 1275 (6th Cir. 1990); *see also John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136 (3d Cir. 1998) (when decision is final, it does not matter whether holding favors arbitration or litigation); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("The weight of authority clearly supports dismissal of the case [rather than a stay] when

all of the issues raised in the district court must be submitted to arbitration."). As demonstrated immediately below, this understanding of the term was known to Congress when it adopted section 16(a)(3).

2. The legislative history of section 16(a)(3) confirms this reading

The context in which section 16 of the FAA was adopted illustrates why the provision is arranged as it is. Prior to section 16, many courts were resorting to policy to find that decisions hostile to arbitration were subject to an immediate appeal, while decisions favoring arbitration generally did not warrant such treatment.[12] At the time of the adoption of section 16, it was generally acknowledged that the state of the law on appealability was a muddled mess. *See, e.g.*, *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1217 (7th Cir. 1998) (Wood, J., dissenting); *see also* Edith H. Jones, *Appeals of Arbitration Orders—Coming Out of the Serbonian Bog*, 31 S. TEX. L. REV. 361, 379 (1990) ("It is ironic that arbitration, which sought to avoid the expense and delay of conventional litigation, has become so fraught with procedural complexity."). Section 16 was designed to provide clear rules as to appealability, and when given its plain meaning and read in context of the structural framework Congress provided, it does so. *See* parts II.A and II.A.1, *supra*. In solving the problem presented by the courts' divergent treatment of interlocutory orders regarding arbitration, there

---

12. *Compare Buffler v. Elec. Computer Programming Inst., Inc.*, 466 F.2d 694, 698-99 (6th Cir. 1972) (holding orders disfavoring arbitration actions are immediately appealable), *with Zosky v. Boyer*, 856 F.2d 554, 560-61 (3d Cir. 1988) (finding that order granting motions to stay ongoing proceedings and to compel arbitration is not subject to immediate appeal).

is no indication Congress intended to disturb or change the traditional rules governing final decisions of the federal courts.

The impetus for section 16 came from both lawyers and federal judges. The Judicial Conference of the United States incorporated the recommendation that has become section 16 into its proposed omnibus bill to reform the judiciary. *See* Judicial Branch Improvements Act of 1987, S 1482, 100th Cong., introduced as § 616 (1988); *see also* 134 Cong. Rec. S 16284, S 16309 (1988).

During the legislative process, the Judicial Conference of the United States approved support of an American Bar Association proposal to amend the FAA, specifically setting forth the purpose and intended meaning of what is now section 16(a)(3):

> [U]nder the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, or a final judgment dismissing an action in deference to arbitration. ***These appeals preserve the general policy that appeal should be available where there is nothing left to be done in the district court.***

134 Cong. Rec. at S 16309 (1988) (emphasis added).[13] This legislative understanding of the statute is entirely

---

13. Congress adopted the language proposed by the Judicial Conference that was eventually codified into section 16(a)(3). (Cont'd)

consistent with the notion that finality determinations under section 16(a)(3) should mirror those made under section 1291. Where, as here, "there is nothing left to be done in district court," the appropriate decision is to dismiss.

3. Treating a "final decision" as final poses no threat of piecemeal appeals

Congress, when it enacted section 16, was no doubt cognizant of the potential issues regarding piecemeal litigation. *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430 (1985) (requirement of a "final decision" under 28 U.S.C. § 1291 is to prevent piecemeal appeals). It is thus no accident that section 16(a)(3) uses and incorporates section 1291's final decision requirement, which is designed to prevent parties from interrupting litigation by pursuing piecemeal appeals. *See, e.g., Green Tree*, 531 U.S. at 86 (observing that section 16(a)(3) incorporates "longstanding meaning" of "final decision" from 28 U.S.C. § 1291); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The concern about piecemeal appeals is simply not implicated in cases like this one.

In fact, the circuit courts have indicated that a dismissal is proper when, as in the court below, the claims are ordered to arbitration, leaving the district court with nothing left to

---

(Cont'd)

See Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, Title X, § 1019(a), 102 Stat. 4671 (1988); *see also Arnold v. Arnold Corp.—Printed Communication for Bus.*, 920 F.2d 1269, 1275 & n.5 (6th Cir. 1990). The legislative provisions governing appealability of arbitration orders were originally codified into section 15 of the FAA. In 1990, these provisions were renumbered and moved to section 16. *See Arnold*, 920 F.2d at 1274.

decide. *See Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 (1st Cir. 1998) (dismissal, rather than stay, is proper course when all issues are determined to be arbitrable). In applying the FAA, the Fifth Circuit observed that "[t]he weight of authority clearly supports dismissal of the case [rather than a stay] when ***all*** of the issues raised in the district court must be submitted to arbitration." *Alford*, 975 F.2d at 1164; *see also Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 676 (5th Cir. 1999).[14]

In holding that dismissal was the appropriate course of action in *Alford*, the Fifth Circuit relied in part on *Sea-Land Serv., Inc. v. Sea-Land of P.R., Inc.*, 636 F. Supp. 750, 757 (D. Puerto Rico 1986), and quoted extensively from its analysis:

> Although we understand that plaintiff's motion to compel arbitration must be granted, ***we do not believe that the proper course is to stay the action pending arbitration. Given our ruling that all issues raised in this action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose.***

Alford, 975 F.2d at 1164 (quoting *Sea-Land*, 636 F. Supp. at 757) (emphasis added). Likewise here, the district court agreed that its order would otherwise be a final decision, leaving nothing left for the court to address, yet it ordered a

---

14. In its opinion below, the court of appeals recognized these decisions would have allowed dismissal here. *See Bohai*, 330 F.3d at 311 n.9. (App. at 8a.) On the other hand, the court of appeals felt that this Court's statements in footnote 2 of *Green Tree* prohibited it from reviewing the "stay" here. *See id.* at 309 n.4.

"stay" simply to deprive Bohai of its appellate rights. *See* App. at 9a. Since there is "no [legitimate] purpose" in staying the case, the court of appeals should have treated the March 27, 2002, Order as final and appealable.

There are and will continue to be cases where a stay is appropriate. For example, claims against a non-signatory to an arbitration agreement are properly stayed so that the arbitration between the signatories could proceed, when arbitrable and non-arbitrable claims were "based upon the same operative facts and [were] inherently inseparable." *Hill v. G E Power Sys., Inc.*, 282 F.3d 343, 347 (5th Cir. 2002).

Nonetheless, there comes a point at which there is nothing left to "stay." In that situation, holding onto the case through an artificial "stay" is the height of elevating form over substance. To go the next step and hold that the use of district court's artificial label can prevent appellate review is nothing more than a rewrite of section 16 to eliminate the normal safeguards and right to a timely appeal of a final decision that Congress placed in section 16(a)(3). Stated differently, the purpose and use of that section has simply been rendered essentially meaningless under the Fifth Circuit's approach.

B. Should District Courts Serve As Appellate Gatekeepers And Have The Power To Insulate Their Decision From Scrutiny?

The circuit courts have historically differed in their consideration of the role that a district court should play in disposing of a matter once the arbitration decision has been made. One sentiment, expressed by the Seventh Circuit in a case predating *Green Tree*, is that district judges should not have discretion to manipulate the form of the order to control

appealability: "[W]e decline in this case to leave the jurisdictional trump card in the hand of the district court." *Napleton*, 138 F.3d at 1213.

As discussed above at part I, at least the Fifth and Eleventh Circuits have expressed their interpretation that this Court's statements in *Green Tree* mandate an absolute deference to the label of the district court's decision. When that label is not clear, the Fifth Circuit has attempted to divine the district court's intent as to what constitutes a final order, rather than determining whether there was anything left to decide. In other words, the Fifth Circuit has not hesitated to give "final decision" treatment to other orders not clearly designated as a stay or final, as long as the district court so intended.

For example, in *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 707 (5th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 871 (2003), the Fifth Circuit considered whether an order compelling arbitration, staying related state court proceedings, and administratively closing the case was a "final decision with respect to an arbitration" under 9 U.S.C. § 16(a)(3) and *Green Tree*. The court agreed that the order was final for purposes of an immediate appeal, reasoning as follows:

> ***By distinguishing the terms "dismiss" and "close" as they apply to disposition of a case, Appellees attempt to thwart the Court's instruction in Green Tree to apply the well-established meaning of "final decision."*** . . . We hold that where a district court with nothing before it but whether to compel arbitration and stay state court proceedings issues an order

> compelling arbitration, staying the underlying state court proceedings, and closing the case, thereby ***effectively ending the entire matter on its merits and leaving nothing more for the district court to do but execute the judgment, appellate jurisdiction lies, as the decision is "final" within the contemplation of § 16(a)(3) of the FAA.***

Orr, 294 F.3d at 707-08 (emphasis added). In the decision in the instant case, the Fifth Circuit indicated that its finality analysis in *Orr* turned upon the district court's expressed intent that the case had been finally and conclusively terminated. *See Bohai*, 330 F.3d at 310 & nn.5 & 6. App. at 6a.

It is noteworthy, however, that while the literal language of section 16 does not spell out the rules for making determinations as to whether an order should be "made final" or not, those rules are not hard to find. Congress adopted and used the term "final decision"—which, as previously noted, has a "well developed and longstanding meaning" as a decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."[15] Through use of the term "final decision," Congress effectively directed that those rules and that case law be incorporated by reference. *See Green Tree*, 531 U.S. at 86 (since Congress did not define the term "final decision" in section 16(a)(3), the Court "accord[s] the term its well-established meaning").

---

15. *See Green Tree*, 531 U.S. at 86; *see also United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (inquiry into the meaning of a statute must begin with the plain language of the statute) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)).

In contrast to the concept of automatically appealable "final decisions," federal district courts have been afforded the opportunity to convert interlocutory orders into "final" or appealable decisions for immediate appeal, *see, e.g.*, 28 U.S.C. § 1292(b), FED. R. CIV. P. 54(b), but these vehicles come with considerations attached. For example, to certify an order for immediate review under section 1292(b), the court must find that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).[16]

No similar guidelines are found in section 16(a)(3), and presumably for good reason—Congress was not dealing with interlocutory orders, but "final decisions." Traditionally, final decisions—ones that effectively end the litigation presented—have been immediately subject to appellate review without any resort to any discretionary factors, such as the importance or difficulty of the issue presented or the prejudice to the respective parties. This important distinction is a meaningful expression of Congressional intent showing that parties facing a decision that effectively ends the litigation on the merits should be entitled to an appeal at that time, even absent a controlling question of law.[17] Instead,

---

16. In a similar vein, Rule 54(b) provides parameters for exercising the discretion to make an otherwise unappealable decision in a multiparty case ripe for immediate review—*i.e.*, when the court certifies that "there is no just reason for delay and upon an express direction for the entry of judgment." FED. R. CIV. P. 54(b).

17. *This is precisely* the fact pattern before *the district court in Dustrol. Dustrol v. Champagne-Webber*, No. Civ. A3:01-CV-0650-G, 2002 WL 122500 (N.D. Tex. Jan. 4, 2002).

the only relevant consideration is whether the order is itself a "final decision."[18]

There is no principled reason to treat orders having effectively the same result differently for purposes of appeal solely because an artificial label is attached to the order by the trial court. Moreover, there is good reason to be skeptical of a rule that gives unrestricted power to the district courts to have exclusive control of the appellate valves in arbitration cases, as illustrated by this case. To allow a district court to admit finality and that there was nothing left to do in the case, yet issue a "stay" merely to preclude one party from appealing, contradicts the purpose of allowing an appeal once the arbitration decision is "final." *See Green Tree*, 531 U.S. at 86-87. It also stands to render meaningless section 16(a)(3).

III. At a Minimum, District Courts Must Be Given Parameters for Making the Finality Determination

Without question, district courts must make initial decisions on arbitrability and thus will always play a key role here. Specific guidance is needed here or else there will be more wholly inconsistent and arbitrary decisions. *See* 16 CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3920 at 9 (Discretion "should be cabined by

---

18. *Compare Sullivan v. Finkelstein*, 496 U.S. 617, 627-28 & n.7 (1990) (order invalidating agency regulations was effectively a final order subject to immediate appellate review, even though not captioned as a final judgment), *with Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742, 744 (1976) (even though order was labeled as "final," it was not appealable because issues remained in the district court for resolution); *see also United States v. Lee*, 786 F.2d 951, 955 (9th Cir. 1986) (directing courts to "focus upon the effect of the ruling rather than the label placed on it").

procedures that maintain flexibility to meet circumstances that cannot be defined in advance but also protect against casual exercise of discretionary power."). At a minimum, these decisions should be made thoughtfully and with due regard for the parties' rights and circumstances.

As to the label of its order, the district court in this case did not appear to entertain any consideration other than to express its opinion that Bohai should not be able to appeal. Allowing such a decision to stand will most certainly encourage, if not guarantee, divergent results which eviscerate the predictability, uniformity, and order Congress attempted to establish as to when arbitration orders are appealable.

In sum, district courts are taking contradictory positions on indistinguishable fact patterns. The courts of appeal do not even agree as to the interpretation of this Court's statements in footnote 2 of *Green Tree* and whether those statements mandate the results in the instant case. Only this Court can clarify these "muddy waters" and provide a clear path out of the "Serbonian Bog" that again has become a part of the legal analysis of arbitral jurisprudence.

CONCLUSION

The March 27, 2002, Order of the district court was, or at the very least, should have been made final and appealable. The Order—which expressly disposes of all claims before it and acknowledges that dismissal would be appropriate—should have been treated as a "final decision with respect to an arbitration" for purposes of 9 U.S.C. § 16(a)(3).

For the reasons stated above, Apache Bohai Corporation, LDC's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROXANNE ARMSTRONG
APACHE CORPORATION
2000 Post Oak Blvd.
Suite 100
Houston, Texas 77056-4400
(713) 296-6501

WM. B. WAGNER
MARCY HOGAN GREER*
MARC B. COLLIER
FULBRIGHT & JAWORSKI L.L.P.
600 Congress Avenue
Suite 2400
Austin, Texas 78701
(512) 474-5201

Counsel for Petitioner

* *Counsel of Record*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 30, 2003

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-20489, No. 02-21158

APACHE BOHAI CORPORATION, LDC,

Plaintiff-Appellant,

VERSUS

TEXACO CHINA, B.V.,

Defendant-Appellee.

IN THE MATTER OF:
APACHE BOHAI CORPORATION, LDC,

Petitioner.

April 30, 2003, Filed

SUBSEQUENT HISTORY:
As Revised May 2, 2003.

PRIOR HISTORY:
Appeal from the United States District Court for the Southern District of Texas. H-01-CV-2019. John D. Rainey, US District Judge.

Appendix A

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas.

DISPOSITION:
Appeal dismissed and petition for mandamus relief denied.

* * *

JUDGES:
Before GARWOOD, SMITH, and BARKSDALE, Circuit Judges.

OPINION BY:
JERRY E. SMITH

OPINION:

Petition for Writ of Mandamus to the United States District Court for the Southern District of Texas

JERRY E. SMITH, Circuit Judge:

Apache Bohai Corporation, LDC ("Apache Bohai") appeals an order staying proceedings in the district court and compelling arbitration of its dispute with Texaco China, B.V. ("Texaco"). Because this court's jurisdiction is contested, Apache Bohai filed a conditional petition for writ of mandamus directing the district court to vacate its order and enter an appealable final judgment. Concluding that we lack jurisdiction, we dismiss the appeal. Finding no abuse of discretion, we deny mandamus relief.

Appendix A

I.

On April 2, 1998, Texaco entered into two written farmin agreements[1] with Apache China Corporation ("Apache China"), according to which Apache China agreed to drill and pay for three wells on two of Texaco's acreage blocks in the Bohai Bay area of the People's Republic of China. In December 1998, Apache China assigned its interests in the farmin agreements to Apache Bohai, its affiliate. By June 1999, however, Apache Bohai lost interest in the project and sent documents re-assigning all of its interests under the agreement to Texaco. Texaco signed and returned the relevant documents in January 2000.

These events gave rise to a dispute over the parties' respective obligations under the contract, and in January 2001, Texaco initiated an arbitration proceeding against Apache China. Apache Bohai was not named in the arbitration proceeding but took action anyway, filing suit in Texas state court requesting a declaratory judgment that the dispute was not arbitrable and that it had no liability to Texaco. Texaco removed the state court proceeding to federal district court and moved to dismiss or stay the litigation and to compel arbitration. The district court granted both motions, issuing an order to compel arbitration and choosing to stay rather than dismiss the litigation.

---

1. A farmin agreement is a contract whereby one company acquires an interest in an exploration or production license by paying some of the past or future costs of another company that is relinquishing part of its interest.

Appendix A

II.

Section 16 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 16, governs appellate review of arbitration orders. Congress's intent in enacting § 16 was to favor arbitration,[2] and it did so by authorizing immediate appeals from orders disfavoring arbitration and forbidding immediate appeals from orders favoring arbitration. *Adams v. Ga. Gulf Corp.*, 237 F.3d 538, 540 (5th Cir. 2001) (citing *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990)). The provisions relevant to this dispute vest the courts of appeals with jurisdiction over "final decisions with respect to an arbitration . . . ," § 16(a)(3), while specifically denying appellate jurisdiction over nonfinal orders staying proceedings pending arbitration, § 16(b)(1). Therefore, our jurisdiction turns on whether the district court's order constitutes a final decision.

A final decision is one that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86, 148 L. Ed. 2d 373, 121 S. Ct. 513 (2000) (citations and internal quotation marks omitted). Under this definition, a dismissal is a final decision. *Id.* at 89. The district court, however, did not dismiss the claims, but entered a stay pending arbitration. An arbitration order entering a stay, as opposed to a dismissal, is not an appealable final order.[3]

---

2. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)).

3. *See Cargill Ferrous Int'l v. Sea Phoenix MV*, 325 F.3d 695, 2003 U.S. App. LEXIS 6714, No. 01-31193, 2003 WL 1524466, (Cont'd)

Apache Bohai contends that when a district court enters an order staying an action and referring all disputed matters to arbitration, leaving no live issues before the district court, this court should consider the order to be, in effect, a *de facto* dismissal and thus a final decision appealable under § 16(a)(3). Unlike a dismissal, however, a stay, by definition, constitutes a postponement of proceedings, not a termination, and thus lacks finality. Further, as other courts have noted, entry of a stay rather than a dismissal "suggests that the district court perceives that it might have more to do than execute the judgment once arbitration has been completed." *ATAC Corp. v. Arthur Treacher's, Inc.*, 280 F.3d 1091, 1099 (6th Cir. 2002). Consequently, although it may be true that in some instances the entry of a stay disposes of most or all issues, that fact alone does not render it the functional equivalent of a dismissal.[4]

Apache Bohai cites two cases in which we found appellate jurisdiction despite the plain absence of a dismissal;

(Cont'd)

at *5 (5th Cir. Apr. 9, 2003); *see also Green Tree*, 531 U.S. at 87 n.2 ("Had the district court entered a stay instead of a dismissal in this case, that order would not be appealable."); *Saturn Distrib. Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684, 2003 U.S. App. LEXIS 6874, No. 02-20431, 2003 WL 1561908, at *1 (5th Cir. Apr. 10, 2003) (finding district court order to be a final decision, in part because it was not accompanied by a stay of proceedings).

4. *See ATAC Corp.*, 280 F.3d at 1099. In *Green Tree*, 531 U.S. at 87 n.2, the Court noted that had the district court entered a stay rather than a dismissal, the order would have been unappealable. Thus, even where dismissal is appropriate, i.e., all claims have been referred to arbitration, the entry of a stay rather than a dismissal bars appellate jurisdiction.

neither contradicts our conclusion that a stay is not a final decision. In *Am. Heritage Life Ins. Co. v. Orr,* 294 F.3d 702 (5th Cir. 2002), we held that an order compelling arbitration and "closing" the case was a reviewable final decision.[5] The district court in that case had issued an order staying state court proceedings, compelling arbitration, and closing the case, leaving nothing to do but execute the judgment. *Id.* In that context, we held that "closing" the case was functionally indistinguishable from dismissal.[6] In this case, by contrast, the court did not purport to close the case administratively, nor did it attempt in any other way to terminate its involvement in the proceedings.

Apache Bohai also cites *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.,* 304 F.3d 476 (5th Cir. 2002), as an example of this court's willingness to find the existence of an appealable final decision despite the lack of an explicit dismissal. In *Gulf Guaranty, id.* at 480-81, the district court reopened a suit for the express purpose of consolidating it with a later action. The order forming the basis for the appeal in *Gulf Guaranty* explicitly dismissed the later action but failed to mention the claims from the earlier suit. *Id.* We concluded, in light of the various indications that the court intended to dismiss both suits, that the order was a final decision.

---

5. *Am. Heritage,* 294 F.3d at 708; *but see ATAC Corp.,* 280 F.3d at 1099 (holding that order to compel arbitration and close proceedings is not an appealable final decision).

6. *Am. Heritage,* 294 F.3d at 708 ("There is no practical distinction between 'dismiss' and 'close' for purposes of this appeal.").

Far from expanding the definition of final decision for purposes of § 16(a)(3), we merely recognized that "the intention, as well as the effect [of the order], was to dismiss [the action]." *Id.* at 483.[7] Here, there is no indication that the district court intended to dismiss the case but failed to do so through an oversight. Rather, it entered an order expressly granting a stay of the proceedings pending arbitration.

III.

In the alternative, Apache Bohai seeks a writ of mandamus directing the district court to vacate its order and enter an appealable final judgment. Mandamus is a drastic remedy reserved only for truly extraordinary situations. *Will v. United States,* 389 U.S. 90, 106, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967). The district court must have committed a "clear abuse of discretion" or engaged in "conduct amounting to the usurpation of power." *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 309, 104 L. Ed. 2d 318, 109 S. Ct. 1814 (1989) (citations and internal quotation marks omitted). This burden is particularly heavy in the context of mandamus review of a decision to enter a stay pending arbitration, "because Congress has expressly limited interlocutory review of a district court decision on arbitration." *McDermott Int'l, Inc. v. Underwriters at Lloyds,* 981 F.2d 744, 748 (5th Cir. 1993). "Moreover, it is more than well settled that a writ of mandamus is not to be used as a substitute for appeal[.]" *Id.*

---

7. Indeed, our consideration in *Gulf Guaranty* of the intent underlying the district court's order directly undercuts Apache Bohai's position. If the primary consideration were the practical effect of the order, as Bohai contends, there would have been no need to evaluate the district court's intent.

To establish its entitlement to mandamus relief, Apache Bohai is required to show clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration.[8] It has not made this showing. Apache Bohai is unable to cite a single case in which we held that a district court abused its discretion by staying rather than dismissing proceedings pending arbitration.[9] Indeed, we have held that a decision, under similar circumstances, to issue a stay rather than a dismissal was not an abuse of discretion warranting mandamus.[10]

The appeal in No. 02-20489 is DISMISSED, and the petition for writ of mandamus in No. 02-21158 is DENIED.

---

8. *See McDermott,* 981 F.2d at 748 (citing *Gulfstream Aerospace v. Mayacamas Corp.*, 485 U.S. 271, 289, 99 L. Ed. 2d 296, 108 S. Ct. 1133 (1988)).

9. Apache Bohai relies primarily on *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992), to support its contention that the district court's order constitutes an abuse of discretion. In *Alford,* we concluded that "the weight of authority clearly supports dismissal of a case when all of the issues raised in the district court must be submitted to arbitration." *Id.* at 1164 (emphasis omitted). In other words, *Alford* held merely that dismissal was not an abuse of discretion. *Id.* The court did not hold that dismissal was required under the circumstances, much less that failure to dismiss would have been an abuse of discretion. *See id.; see also Fedmet Corp. v. M/V Buyalyk,* 194 F.3d 674, 676 (5th Cir.1999) (holding that "district courts have discretion to dismiss cases in favor of arbitration," but not implying any obligation to do so).

10. *See McDermott,* 981 F.2d at 748 ("Petitioner has failed to satisfy this most demanding standard [mandamus standard]. The district court did not clearly overstep its authority when it granted the order compelling arbitration and stayed further proceedings pending that arbitration.").

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED MARCH 26, 2002 AND ENTERED MARCH 27, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-01-2019

APACHE BOHAI CORPORATION, LDC,

Plaintiff,

v.

TEXACO CHINA, B.V.,

Defendant.

MEMORANDUM & ORDER

Pending before the Court are the defendant Texaco China, B.V.'s ("Texaco") motions to dismiss or stay litigation and compel arbitration (Dkt. # 4) and for oral hearing (Dkt. # 6). Also pending are the plaintiff Apache Bohai Corporation, LDC's ("Apache Bohai") motions to remand (Dkt. # 9), for partial summary judgment (Dkt. # 17), and to reconsider the Court's Order denying a preliminary injunction (Dkt. # 46). Texaco's motion for oral hearing is DENIED. For the reasons explained below, the Court GRANTS Texaco's motion to compel arbitration and stay this litigation.

As a result, Apache Bohai's motions to remand, for partial summary judgment, and for reconsideration are DENIED as moot.

Factual and Procedural Background

The following material facts are not in dispute. On April 2, 1998, Texaco, a Netherlands corporation, entered into two written farmin agreements[1] with Apache China Corporation, LDC ("Apache China"), a Cayman Islands corporation. Under the farmin agreements, Apache China agreed to drill and pay for three wells on two of Texaco's acreage blocks in the Bohai Bay area of the People's Republic of China. As consideration for the agreements, Texaco assigned 50% of its interests in the blocks to Apache China. Each farmin agreement contains an identical arbitration clause that states, in relevant part:

> Any dispute arising out of or relating to this agreement, including any question regarding its existence, validity, or termination, which cannot be amicably resolved by the parties shall be settled in New York, New York in accordance with the American Arbitration Association ("AAA") arbitration procedures.

See Dkt. # 4, Exs. A, B at art. 15.02 ("Farmin Agreements"). The farmin agreements further provide that they are governed by New York law. *See id.* at art. 15.01.

---

1. A "farmin" or "farm in" agreement is a contract in which "one company acquires an interest in an exploration or production license by paying some of the past or future costs of another company which is relinquishing part of its interest." *See Gas Sector - Jargon Buster,* ENERGYWEB.NET at http://www.energyweb-net/gas/jargon/default.asp?u_letter=f (last visited March 15, 2002).

Appendix B

In December 1998, Apache China assigned its interests in the farmin agreements to Apache Bohai, another Cayman Islands corporation. On April 6, 1999, Apache Bohai and Texaco modified the farmin agreements to change the mandatory date for spudding[2] the wells to September 2000. On June 14, 1999, Apache Bohai informed Texaco that it would not drill the wells. On June 28, 1999, Apache Bohai sent Texaco documents re-assigning all of Apache Bohai's interests in the farmin agreements to Texaco. A representative of Texaco signed these documents on December 27, 1999, and sent them to Apache Bohai on January 12, 2000.[3]

This course of events gave rise to a dispute between the parties regarding Apache Bohai's remaining duties under the farmin agreements. On January 9, 2001, Texaco initiated an arbitral proceeding against Apache China. On May 16, 2001, Apache Bohai filed suit against Texaco in the 164th Judicial District Court of Harris County, Texas. In the state court suit, Apache Bohai sought a declaratory judgment that the farmin agreements had terminated, that Apache Bohai had no liability to Texaco, and that the disputes were not subject to arbitration. On May 25, 2001, Texaco amended its notice of arbitration to allege claims against both Apache China and

---

2. "Spudding" is the beginning of the process used to drill a well. *See "Spud,"* MERRIAM-WEBSTER ONLINE DICTIONARY at http://m-w.com/ (last visited March 15, 2002).

3. As Apache Bohai notes in its brief, the discrepancy in these dates is irrelevant to the parties' disputes.

Apache Bohai. Texaco then removed Apache Bohai's action to this Court.[4]

After removal, Texaco moved to dismiss or stay the litigation and to compel arbitration. In response, Apache Bohai moved for a preliminary injunction against the arbitral proceedings pending the Court's ruling on arbitrability, for summary judgment on the issue of arbitrability, and to remand the action to state court. The Court denied the motion for preliminary injunction because it found that Apache Bohai had failed to demonstrate irreparable harm, but reserved the substantive issue of arbitrability for later consideration. Apache Bohai has requested that the Court reconsider this decision.

Discussion

The parties have raised several issues concerning whether the issues in this case should be decided through arbitration. First, they dispute whether the farmin agreements provide that an arbitrator shall decide the issue of "arbitrability," or whether the parties' underlying dispute is subject to arbitration. Second, if the agreements require the Court to decide arbitrability, the parties disagree on whether their underlying dispute is subject to arbitration. Finally, assuming that arbitration is appropriate, the parties disagree whether the Court should stay or dismiss Apache Bohai's claims against Texaco. The Court will address each issue in turn.

---

4. The Court has jurisdiction over this case pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as incorporated into the Federal Arbitration Act. *See* 9 U.S.C. §§ 203 (original jurisdiction), 205 (permitting removal).

Appendix B

1. Arbitration in general.

Federal and state law strongly favor enforcement of arbitration agreements. *See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 676 (5th Cir. 1999) (quoting *United Offshore Co. v. Southern Deepwater Pipeline Co.*, 899 F.2d 405, 408 (5th Cir. 1990)); *Singer v. Jefferies & Co., Inc.*, 575 N.E.2d 98,100 (N.Y. 1991) (citations omitted); *In re FirstMeritBank, N.A.*, 52 S.W.3d 749, 753 (Tex. 2001) (citing *In re Oakwood Mobile Homes*, 987 S.W.2d 571, 573 (Tex.1999)). The preference for enforcement is so strong that any "[d]oubts as to the availability of arbitration must be resolved in favor of arbitration." *Fedmet Corp.*, 194 F.3d at 676 (quoting *United Offshore Co.*, 899 F.2d at 408). The presumption in favor of enforcement "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

In this case, the arbitration provisions of the farmin agreements are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), as incorporated into the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 201, *et seq.* *See SmithlEnron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999). Apache Bohai does not dispute that, should the Court find that a valid arbitration agreement governs the parties' dispute in this case, the FAA and the Convention will compel arbitration. Consequently, the Court must determine whether the parties' arbitration agreements control their current dispute.

Appendix B

When deciding whether the parties agreed to arbitrate a certain matter, courts generally apply ordinary state-law principles that govern the formation of contracts. *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995). In this case, the farmin agreements contain an unambiguous choice of law provision that selects New York law. *See* Farmin Agreements at art. 15.01. When determining choice of law issues, the Court applies the law of the state in which it is located, Texas. *See Jackson v. West Telemarketing Corp. Outbound,* 245 F.3d 518, 522 (5th Cir. 2001) (citing *Klaxon Co. v. Stentor Electric Manufacturing Co.,* 313 U.S. 487 (1941)). Neither party has disputed that Texas courts would uphold the farmin agreements' choice of law provisions. *See Access Telecom, Inc. v. MCI Telecommunications Corp.,* 197 F.3d 694, 705 (5th Cir. 1999) (citing *De Santis v. Wackenhut,* 793 S.W.2d 670, 677-78 (Tex. 1990)). As a result, the Court will apply the law of New York when interpreting the arbitration provisions of the farmin agreements.

2. Who decides arbitrability?

First, the Court must determine whether the parties have agreed to arbitrate the question of arbitrability, or who decides whether their underlying dispute regarding Apache Bohai's remaining duties under the farmin agreements is subject to arbitration. In contrast to the strong presumption in favor of enforcing agreements to arbitrate underlying disputes, the Supreme Court has held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options,* 514 U.S. at 944 (quoting *AT&T Techs., Inc. v. Communications Workers,* 475 U.S. 643, 649 (1986))

(internal quotation marks omitted). The Supreme Court reasoned that, while parties often contemplated the scope of arbitration regarding issues that arose under the contract, they did not often focus on the "rather arcane" question of who would decide arbitrability. *Id.* It also expressed concern that presumptively placing the power to determine whether a dispute is arbitrable in the hands of arbitrators would "too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* Consequently, the presumption in favor of arbitration is reversed when considering this issue, and any silence or ambiguity about whether the parties wished to arbitrate arbitrability is construed against arbitration. *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *see also Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 n.3 (5th Cir. 1996).

Texaco makes three arguments in support of its contention that the parties have agreed to arbitrate arbitrability. First, Texaco argues that the *First Options* presumption against arbitrability does not apply to cases in which the underlying dispute arises from the termination of a contract. Next, it argues that the arbitration agreements indicate the parties' intent to arbitrate arbitrability because they incorporate the AAA's arbitration procedures, which permit the arbitrator to determine its own jurisdiction. Finally, it argues that the language of the arbitration agreements is sufficiently clear to indicate that the parties intended to arbitrate arbitrability.

Appendix B

a. Is a dispute about the termination of a contract itself an issue of arbitrability?

To address Texaco's first argument, the Court must clear up some confusion about the issues raised in the motion to compel arbitration and its response. Texaco argues that the *First Options* presumption does not apply to disputes regarding the possible termination of an arbitration agreement. Apache Bohai responds that Texaco erroneously seeks to apply *First Options* to the issue of whether the underlying issues in this case should be arbitrated. Both parties appear to misunderstand each others' arguments, creating an unnecessary amount of complexity on this issue.

The parties' disagreement concerns their interpretation of *Abram Landau Real Estate v. Benova,* 123 F.3d 69 (2d Cir. 1997). In *Landau,* the Second Circuit considered whether to affirm the confirmation of an arbitral award to a labor union for the violation of a collective bargaining agreement ("CBA"). *See id.* at 71. Though the alleged violation had occurred subsequent to the expiration of the CBA, the CBA contained an "evergreen clause" that provided that the CBA would continue into effect for a certain period until an new agreement was executed. *Id.* In response to the union's attempts to arbitrate the underlying dispute, the employer filed a suit in federal district court alleging that the evergreen clause was invalid. *Id.* The district court ruled that the arbitrator, not the court, should determine the validity of the evergreen clause, and dismissed the employer's claims. *Id.* at 71-72. After the arbitrator awarded damages against the employer, the district court confirmed the award. *Id.* at 72.

Appendix B

The Second Circuit affirmed the district court. *Id.* at 75. It explained that problems of "arbitrability" arose when parties disputed whether a particular arbitration agreement was in effect during a given time period. *Id.* at 72. These disputes were of two types. In the first type, the parties disputed whether they had ever entered an arbitration agreement. *Id.* When analyzing whether an arbitrator should resolve the first type of dispute, the Second Circuit stated that courts should apply the *First Options* presumption against arbitrability. *Id.* at 72-73. The court reasoned that the policy concerns expressed in *First Options,* particularly those concerning whether the parties had given any thought to the scope of arbitration, were present when evaluating whether they had agreed to arbitrate at all. *Id.*

The second type of dispute, present under the facts of *Landau,* occurred when the parties disputed whether an existing arbitration agreement had expired or terminated. *Id.* at 72. According to the Second Circuit, this dispute differed from the first type because the parties already had agreed to arbitrate certain disputes arising from the agreement. *Id.* at 73. As disputes over whether an agreement had expired or terminated involved interpretation of the terms of the agreement, a dispute that the parties had clearly contemplated could occur, the court found that *First Options'* policy concerns did not arise. *Id.* at 73-74. Thus, to the extent that such disputes were considered issues of "arbitrability" at all, the Second Circuit held that *First Options'* presumption against arbitration was inapplicable. *Id.* at 73.

Apache Bohai argues that the Second Circuit panel in *Landau* misinterpreted *First Options.* It believes that the

Second Circuit erroneously and inexplicably exempted cases involving termination of contracts from the limitations of *First Options*. This argument misreads Texaco's argument and the Second Circuit's reasoning. Texaco does not contend that *First Options* does not apply to the issue of who decides whether an underlying dispute is arbitrable. Instead, it contends that the issue of whether an arbitration agreement has terminated does not raise the policy concerns expressed in *First Options*, and therefore is not an issue of "arbitrability." The Second Circuit's opinion amply supports this proposition, and the Court adopts its reasoning. *See Landau*, 123 F.3d at 73-74.

For its part, Texaco contends that Apache Bohai seeks to apply the *First Options* presumption to the issue of whether their underlying dispute is arbitrable, rather than to whether they must arbitrate arbitrability. After reviewing Apache Bohai's brief, the Court disagrees. Apache Bohai argues only that *First Options* governs the question of who decides whether the underlying dispute is arbitrable. This is clearly correct, and the Court will apply the *First Options* presumption against sending the issue of arbitrability of the parties' dispute over Apache Bohai's remaining duties under the farmin agreements to an arbitrator rather than the Court.

To summarize, *Landau* held that the issue of whether an arbitration agreement terminated is not one of "arbitrability," but rather the underlying dispute. *See Landau*, 123 F.3d at 73. Thus, the Court will analyze the issue of who decides whether the parties' underlying dispute is arbitrable utilizing the *First Options* framework. Should it find that the parties did not intend to arbitrate arbitrability, the Court will examine whether the parties intended to arbitrate the termination issue.

b. Is the parties' adoption of the AAA arbitration procedures "clear and unmistakable" evidence of their intent to arbitrate arbitrability?

Next, Texaco argues that the arbitration agreements' adoption of the AAA arbitration procedures indicates the parties' intent to allow the arbitrator to decide arbitrability. *See* Farmin Agreements at art. 15.02. The AAA's International Rules state that:

> 1. The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
>
> 2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

AAA International Rules, art. 15, 1998 WL 1527115, at *6 (Oct. 1998) ("AAA International Rule 15"); *see also* AAA Commercial Arbitration Rule 8, 1999 WL 1627984, at *7 (Feb. 1999) (same) ("AAA Commercial Rule 8"). Texaco argues that the adoption of these rules, along with their agreement to arbitrate "[a]ny dispute arising out of or relating to the [farmin agreements], including any question regarding

[their] existence, validity, or termination" constitutes "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability. *See First Options,* 514 U.S. at 944.

In support of its argument, Texaco points out that several courts have found "clear and unmistakable" evidence of intent to arbitrate arbitrability where the parties have adopted the arbitration rules of other organizations, such as the National Association of Securities Dealers ("NASD").[5] *See, e.g., PaineWebber, Inc. v. Bybyk,* 81 F.3d 1193, 1202 (2d Cir. 1996); *FSC Securities Corp. v. Freel,* 14 F.3d 1310, 1312-13 (8th Cir. 1994); *Smith Barney Shearson, Inc. v. Sacharow,* 689 N.E.2d 884, 888 (N.Y. 1997); *see also Apollo Computer, Inc. v. Berg,* 886 F.2d 469, 473-74 (1st Cir. 1989) (interpreting the arbitration rules of the International Chamber of Commerce). In *Bybyk,* for example, the Second Circuit examined whether a court or an arbitrator should determine whether a party had filed a timely claim under § 15 of the NASD Code, which limits such claims to those filed within six years of the event giving rise to the dispute. *See Bybyk,* 81 F.3d at 1196-97. The court found that an agreement that provided for arbitration, of "[a]ny and all controversies . . . concerning . . . the construction, performance, or breach of this . . . agreement . . . ." was sufficient to indicate the parties' "clear and unmistakable"

5. Apache Bohai argues that *Freel* and *Berg* are irrelevant to the Court's analysis because both predate *First Options*. Both cases, however, employ the same standard - whether the language indicates a "clear and unmistakable" intent to arbitrate - as *First Options*. *See Freel,* 14 F.3d at 1312-13; *Berg,* 886 F.2d at 473-74. As a result, the Court will consider whether their reasoning may apply to the parties' current dispute over the incorporation of the AAA Rules.

intent to submit the issue to the arbitrator. *Id.* at 1199-1200. In dicta,[6] however, the Second Circuit noted that it would have reached the same conclusion had the parties incorporated the NASD Code into the agreement because § 35 granted arbitrators "the power to determine the applicability of all provisions" under the Code. *Id.* at 1202. The court agreed with the Eighth Circuit's conclusion that this language was a "clear and unmistakable" expression of intent to arbitrate issues of arbitrability. *Id.* (quoting *Freel*, 14 F.3d at 1312-13).

In response, Apache Bohai points out that several other courts have found the incorporation of the NASD Code insufficiently specific to indicate a "clear and unmistakable" intent to permit an arbitrator to decide the issue of arbitrability.[7] *See, e.g., Miller v. Flume,* 139 F.3d 1130, 1134

---

6. *See John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 54 (2d Cir. 2001) (also characterizing this reasoning as "dicta").

7. Apache Bohai also cites *PaineWebber Inc. v. Harmann,* in support of its argument that the farmin agreements' incorporation of the AAA International Rules does not require the parties to arbitrate arbitrability. 921 F.2d 507 (3d Cir. 1990). This case, however, predated *First Options* and did not analyze whether the rules at issue indicated that the parties "clearly and unmistakably" had intended to arbitrate arbitrability. *Id.* at 511-14 (holding that the arbitrator had jurisdiction to decide whether the parties had met the time limitation imposed by the arbitration rules of the New York Stock Exchange because the court could not say with "positive assurance" that the dispute fell outside the scope of the arbitration agreement). As a result, *Harmann* is not helpful to the Court's analysis in the current case.

The Fifth Circuit's own precedent on the issue is similarly unhelpful. *See Smith Barney Shearson, Inc. v. Boone,* 47 F.3d 750

(Cont'd)

(7th Cir. 1998); *Smith Barney, Inc. v. Sarver,* 108 F.3d 92, 96-97 (6th Cir. 1997); *Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 78 F.3d 474, 480-81 (10th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen,* 62 F.3d 381, 384 (11th Cir. 1995). In *Cogswell,* for example, the Tenth Circuit found that the language of § 35 of the NASD Code granted arbitrators the power to interpret the Code's provisions, but was ambiguous regarding whether a court also could make those determinations. *See Cogswell,* 78 F.3d at 480. Applying *First Options'* presumption against arbitration, the court concluded that § 35 was not evidence of "clear and unmistakable" intent to arbitrate whether the parties had complied with the deadlines set in § 15. *Id.* at 480-81. The Court finds this reasoning more persuasive.

Texaco also argues that the language of the AAA rules is distinguishable from that of the NASD Code because it more explicitly grants the arbitrator the power to decide issues involving his own jurisdiction. *See* AAA International

---

(Cont'd)

(5th Cir. 1995). In *Boone,* which was decided several months before *First Options,* the Fifth Circuit examined the time limits imposed under § 15 of the NASD and a similar provision of the rules of the American Stock Exchange. *Id.* at 751-52. The court found that the rules were not substantive limits on the arbitrator's jurisdiction, but rather were procedural in nature. *Id.* at 753-54. Such issues of "procedural arbitrability" were not arbitrable, regardless of whether the parties intended to arbitrate them. *Id.* at 754. The distinctions drawn in *Boone* do not apply where, as here, the rules obviously raise issues of "substantive arbitrability" because they expressly grant the arbitrator the power to determine its own jurisdiction. *See* AAA International Rule 15; AAA Commercial Rule 8.

Rule 15; AAA Commercial Rule 8. However, despite the AAA rules' express inclusion of the term "jurisdiction," their grant of power is permissive rather than mandatory. The permissive language in § 35 of the NASD Code was the basis for the courts' finding that its incorporation did not require arbitration of arbitrability. *See, e.g., Cogswell,* 78 F.3d at 480. The Court finds the reasoning of these courts persuasive, and analogous to the parties' incorporation of the AAA rules into the farmin agreements.[8] Consequently, the Court finds that this incorporation does not indicate that the parties intended to arbitrate arbitrability.[9]

---

8. Courts have reached the opposite conclusion when evaluating arbitration agreements that incorporate rules with mandatory language. In *Berg,* for example, the Third Circuit interpreted an agreement incorporating the arbitration rules of the International Chamber of Commerce ("ICC"). *See Berg,* 886 F.3d at 470. The applicable ICC rule stated that "any decision as to the arbitrator's jurisdiction *shall* be taken by the arbitrator himself." *Id.* at 473 (quoting Article 8.3 of the ICC's Rules of Arbitration) (emphasis added). The court reasoned that the mandatory language of this rule was sufficient to indicate the parties' "clear and unmistakable" intent to permit arbitrators to decide arbitrability. *Id.* In contrast, the AAA rules do not contain any language mandating that the arbitrator decide issues involving its own jurisdiction. *See* AAA International Rule 15; AAA Commercial Rule 8.

9. Subsequent to the parties' briefing in this case, a district court in Florida examined this issue. *See Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A., v. MedPartners, Inc.,* 203 F.R.D. 677 (S.D. Fla. 2001). The court found the parties' agreement to permit the AAA to conduct the arbitration incorporated the AAA Rules into the arbitration agreement. *Id.* at 684. It then found that AAA Commercial Rule 8, which grants the arbitrator the power to

(Cont'd)

c. Does the language of the arbitration clauses in the farmin agreements provide "clear and unmistakable" evidence of the parties' intent to arbitrate arbitrability?

Finally; Texaco argues that the parties' agreement to arbitrate "[a]ny dispute arising out of or relating to the [farmin agreements], including any question regarding [their] existence, validity, or termination" constitutes "clear and unmistakable" evidence of their intent to arbitrate arbitrability. The Court disagrees. As noted earlier, disputes regarding whether a contract exists, is valid, or has terminated are not issues of arbitrability. *See Landau,* 123 F.3d at 73-74. As silence or ambiguity about whether the parties intended to arbitrate arbitrability is construed against the party seeking arbitration, the broad form language of the arbitration agreement lacks the necessary specificity to overcome *First Options* 'presumption against arbitrability. *See First Options,* 514 U.S. at 944 (citing *Mitsubishi Motors Corp.,* 473 U.S. at 626). Consequently, the Court, rather than an arbitrator, must determine whether the parties' underlying dispute regarding Apache Bohai's remaining duties under the farmin agreements is arbitrable.

(Cont'd)

determine its own jurisdiction, was "clear and unmistakable" evidence of an agreement to arbitrate issues of arbitrability. *Id.* at 684-85. Respectfully, the Court disagrees with this conclusion for the reasons explained above.

3. Is the parties' dispute over Apache Bohai's remaining duties under the farmin agreements arbitrable?

According to the Fifth Circuit, the framework for deciding whether to grant a motion to compel arbitration under the Federal Arbitration Act requires a two-part inquiry. *See Webb v. Investacorp, Inc.*, 89 F.3d 252, 257-58 (5th Cir. 1996); *R.M. Perez & Assoc., Inc. v.* Welch, 960 F.2d 534, 538 (5th Cir. 1992). In the first step, the court determines whether the parties agreed to arbitrate the dispute in question. *See Webb*, 89 F.3d at 258 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). This determination involves considering: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. *Id.* In deciding whether the parties agreed to arbitrate the dispute, courts should apply general state law principles governing contract formation. *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)). However, the court must give due regard to the federal policy favoring arbitration, and should resolve ambiguities regarding the scope of the arbitration clause in favor of arbitration. *Id.* (quoting *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989)). In the second step, the court must evaluate "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 628).

In this case, Apache Bohai does not dispute that it formed valid arbitration agreements with Texaco. Instead, it contends that the parties' disputes fall outside the scope of those

agreements because the disputes arose subsequent to the termination of the farmin agreements. According to Apache Bohai, the parties exchanged documents in 1999 that terminated the farmin agreements in accordance with their terms. *See* Dkt. # 12, Exs. 7-9 (correspondence between the parties); Farmin Agreements at art. 7.01-02 (provisions governing default). Texaco, however, did not file its demand for arbitration against Apache China until January 9, 2001, about one year after the alleged termination of the farmin agreements. Apache Bohai reasons that the disputes occurred subsequent to the expiration of the arbitration agreements, and therefore are not subject to arbitration.

When interpreting arbitration agreements, courts must presume that parties intended to arbitrate matters that arise subsequent to the termination of the underlying contracts. *See Litton Fin. Printing Div. v. NLRB,* 501 U.S. 190, 205 (1991) (quoting *Nolde Bros., Inc. v. Bakery Workers,* 430 U.S. 243, 255 (1977)). This presumption may be "negated expressly or by clear implication," and does not apply where the arbitration does not concern matters "arising out of" the contractual relationship. *Id.* (quoting *Nolde Bros.,* 430 U.S. at 255). According to Apache Bohai, the *Litton* presumption does not mandate arbitration of the underlying disputes in this case for both reasons.

First, Apache Bohai claims that the parties negated the *Nolde Brothers* presumption in favor of arbitrability. It points out that the farmin agreements state that, subsequent to termination, Apache Bohai remains bound by the agreements' confidentiality provisions. *See* Farmin Agreements at

art. 7.03. Utilizing the canon of interpretation "*expressio unius est exclusio alterius,*"[10] Apache Bohai contends that the parties' decision to include only the confidentiality provisions in this clause indicates their intent to exclude all other obligations, including the obligation to arbitrate. It also provides a copy of the parties' Joint Operating Agreement, which governed various other aspects of the parties' joint project. *See* Dkt. # 12, Ex. 4 ("JOA"); *see also* Farmin Agreements at 3.06 (referencing JOA). In the JOA, which was signed on the same day as the farmin agreements, the parties' arbitration agreement expressly survives the termination of the contract.[11] *See* JOA at ¶ 18.4. Apache Bohai claims that, had the parties intended for the arbitration agreements to survive the termination of the farmin agreements, they would have included the same language in those agreements as in the JOA.

The Court finds these arguments unpersuasive. As noted earlier, the arbitration agreements require arbitration of "[a]ny dispute arising out of or relating to [the farmin agreements], including any question regarding [their] existence, validity, or *termination.*" Farmin Agreements at art. 15.02 (emphasis added). In the current case, Apache Bohai alleges that the farmin agreements terminated, and that this termination absolves it from any liability to Texaco for

---

10. Translated from Latin, the phrase means " the expression of one thing is the exclusion of another." *See* BLACK'S LAW DICTIONARY 602 (7th ed. 1999).

11. Neither party contends that the JOA was part of the farmin agreements for purposes of evaluating arbitrability, or that the current disputes arose under the JOA rather than the farmin agreements.

its failure to drill the wells. *See* Dkt. # 4, Ex. H at ¶¶ 16, 19 (Apache Bohai's Original Petition). Thus, contrary to Apache Bohai's arguments, the language of the farmin agreements appears to contemplate expressly that the parties would arbitrate the issue of whether the farmin agreements terminated.

Also, while New York courts recognize the *expressio unius* canon of construction, they generally try to avoid interpretations that would "leave contractual clauses meaningless." *See, e.g., Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Assoc.*, 472 N.E.2d 315, 318 (N.Y. 1984); *see also Bybyk*, 81 F.3d at 1199 (quoting *American Express Bank Ltd. v. Uniroyal, Inc.*, 562 N.Y.S.2d 613, 614 (1st Dep't 1990)) (Under New York law governing contracts, "'the intent of the parties governs,' and therefore '[a] contract should be construed so as to give full meaning and effect to all of its provisions.'"); *Ronnen v. Ajax Elec. Motor Corp.*, 671 N.E.2d 534, 536 (N.Y. 1996) (collecting cases). Adopting the interpretation that Apache Bohai urges would render the language concerning "termination" in the arbitration clause meaningless because disputes over termination could arise only after at least one of the parties alleged that the farmin agreements had terminated. The Court therefore finds that the parties intended to arbitrate post-expiration disputes arising out of the farmin agreements.

Alternatively, Apache Bohai argues that the matters that Texaco seeks to arbitrate did not "arise out of" the farmin agreements. In *Litton*, the Supreme Court stated that a post-expiration dispute arises out of a contract "only where it involves facts and occurrences that arose before expiration,

where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."[12] *Litton,* 501 U.S. at 205.

Apache Bohai claims that the current dispute with Texaco does not involve facts and occurrences that arose prior to the expiration of the farmin agreements. It argues that a broad application of this standard is inappropriate because it would require arbitration in almost every post-expiration dispute. The Sixth Circuit has examined this problem, concluding that the parties' course of dealing prior to expiration generally would include facts or occurrences relevant to the post-expiration dispute. *See South Centr. Power Co. v. International Bhd. of Elec. Workers,* 186 F.3d 733, 740 (6th Cir. 1999). To address the "risk of the exception swallowing the rule," the court held that "a majority of the material facts or occurrences [must be] found to arise prior to the agreement's expiration" for *Litton* to apply. *Id.* The Court finds this reasoning persuasive, and adopts this standard.

---

12. Apache Bohai argues that the dispute must meet two of the three elements of this test to qualify for the presumption of arbitrability under *Litton.* It claims that the use of the word "or" to refer only to the third element means that the dispute must satisfy the first element and either the second or third elements. Apache Bohai does not cite to any authority to support this odd interpretation of *Litton*'s relatively straightforward holding, and the Court declines to adopt it. *Cf. South Centr. Power Co. v. International Bhd. of Elec. Workers,* 186 F.3d 733, 740 (6th Cir. 1999) (holding that a dispute "arises under the contract" where the majority of material facts arose before the expiration of the agreement, without requiring satisfaction of the other two elements of the *Litton* test).

Applying the test to the dispute between Apache Bohai and Texaco, the Court finds that the majority of material facts occurred prior to the alleged expiration of the farmin agreements. The parties' dispute centers around whether the farmin agreements terminated before the deadline for Apache Bohai to drill the wells expired. Apache Bohai argues that it notified Texaco that it would not drill the wells and tendered its interests under the farmin agreements to Texaco in June 1999. *See* Dkt. # 12; Exs. 7-8. It also contends that Texaco accepted this offer by executing the documents that Apache Bohai had sent, terminating Apache Bohai's contractual obligations to Texaco. *Id.*, Ex. 9. All of these occurrences therefore are material to the determination of Apache Bohai's liability to Texaco, and occurred prior to the alleged termination of the contracts.[13] Consequently, the Court concludes that the parties' dispute is subject to the *Litton* presumption of arbitrability.

Examining the language of the arbitration agreements under the *Litton* presumption, it is clear that the parties intended to arbitrate issues involving the termination of the farmin agreements. *See* Farmin Agreements at art. 15.02 (requiring arbitration of "[a]ny dispute arising out of or

---

13. The Court rejects Apache Bohai's argument that these facts could not give rise to an action for breach because its obligation to drill the wells did not mature until September 2000. *See* Dkt. # 12, Ex. 6. Whether Apache Bohai is liable to Texaco rests upon whether its actions prior to the alleged expiration were sufficient to terminate its obligations under the contract. In light of its unequivocal representations to Texaco that it would not perform its duties under the farmin agreements, the actual failure to drill the wells would not control this determination.

relating to this agreement, including any question regarding its existence, validity, or *termination* . . . .") (emphasis added). Even had they not used the term "termination," the broad language in the arbitration agreements is sufficient to cover issues of termination. *See Landau,* 123 F.3d at 74 (citing *Brotherhood of Teamsters and Auto Truck Drivers Local #70 v. Interstate Distrib. Co.,* 832 F.2d 507, 510 (9th Cir. 1987)) ("Where the agreement contains a sweeping arbitration clause covering all disputes involving the meaning of terms and provisions of the agreement and where the arbitration clause does not expressly exclude disputes over the termination provision . . . , disputes over these matters should be submitted to arbitration."). Ultimately, resolution of whether the farmin agreements terminated requires an evaluation of whether the parties' actions satisfy the requirements of the contract, an underlying issue that the Court cannot decide on a motion to compel arbitration.[14] *See City of Meridian v. Algernon Blair, Inc.,* 721 F.2d 525, 528 (5th Cir. 1983) ("The court's sole function is to determine whether the claim is referable to arbitration. Once that determination is made, the court may not delve further into the dispute."). As Apache Bohai does not contend that external legal constraints would foreclose arbitration of its claims, the Court finds that the claims are subject to arbitration, and therefore grants Texaco's motion.

---

14. Apache Bohai also complains that Texaco waited over a year past the return of Apache Bohai's rights under the farmin agreements to allege that it had failed to fulfill its obligations to drill the wells. To the extent that Apache Bohai seeks to argue that Texaco's demand for arbitration was untimely, it raises a question of procedure for the arbitrator. *See Commerce Park at DFW Freeport v. Mardian Constr. Co.,* 729 F.2d 334, 339 n.5 (5th Cir. 1984).

4. Should the Court stay or dismiss this action?

Under the Federal Arbitration Act, a court may stay a case once it determines that the issues raised in the complaint are referable to arbitration. *See* 9 U.S.C. § 3. This provision does not, however, bar dismissal of a case in which all of the claims are subject to arbitration. *See Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *see also Fedmet Corp.*, 194 F.3d at 676-77; *Brennan v. Aetna Life Ins. Annuity Co.*, 2001 WL 167954, at *1 (N.D. Tex. January 19, 2001); *Marsh v. First USA Bank, N.A.*, 103 F.Supp.2d 909, 925 (N.D. Tex. 2000). Such a dismissal is within the exercise of the court's discretion. *See Brennan*, 2001 WL 167954 at *1 (citing *Alford*, 975 F.2d at 1164).

Texaco argues that dismissal is improper in this case because the parties' dispute over arbitration is "embedded" within Apache Bohai's claims for declaratory relief. When determining whether it has appellate jurisdiction over a case, the Fifth Circuit formerly distinguished between independent and embedded actions for purposes of determining whether an order compelling arbitration is final or interlocutory in nature. *See F.C. Schaffer & Assoc., Inc. v. Demech Contractors, Ltd.*, 101 F.3d 40, 41-42 (5th Cir. 1996) (quoting *McDermott Int'l, Inc. v. Underwriters at Lloyds Subscribing to Memo of Ins. No. 104207*, 981 F.2d 744, 747 (5th Cir. 1993)). Even assuming that this distinction is analogous to the Court's current inquiry,[15] the Supreme Court recently has

15. In *F.C. Shaffer*, the Fifth Circuit examined whether a court's order compelling arbitration and staying a case was appealable as a final order under the FAA. *See F.C. Shaffer*, 101 F.3d at 41. The FAA

(Cont'd)

rejected the "rather complex" framework altogether, holding that orders compelling arbitration and dismissing parties' underlying claims are final decisions regardless of whether they are "embedded." *See Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 88-89 (2000); *see also Salim Oleochemicals v. M/V Shropshire,* 278 F.3d 90, 92-93 (2d Cir. 2002) (interpreting *Green Tree* to invalidate the distinction and listing similar holdings in three other circuits).

Despite this, the Court finds that dismissal is inappropriate in this case. Examining the *Green Tree* decision, the Second Circuit has observed that the FAA prohibits appeals of an order staying an action pursuant to 9 U.S.C. § 3. *See Salim Oleochemicals,* 278 F.3d at 93 (citing 9 U.S.C. § 16(b)). It also noted that the purpose of the "independent/embedded" distinction was to enforce the strong federal policy favoring arbitration by avoiding "[u]nnecessary delay of the arbitral process through appellate review." *Id.* In this case, further appellate review would substantially delay the resolution of the parties' disputes

---

(Cont'd)

does not allow appeals of interlocutory orders compelling arbitration, but permits appeals of final orders that do so. *See id.* (citing 9 U.S.C. § 16). A final order "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* Though *F.C. Shaffer* concerns appellate jurisdiction under § 16 rather than discretion to dismiss under § 3, its discussion presumably is analogous to *Alford*'s holding that a district court has discretion to dismiss a case if it rules "that all issues raised in this action are arbitrable and must be submitted to arbitration" because "retaining jurisdiction and staying the action will serve no purpose." *Alford,* 975 F.2d at 1164. The Fifth Circuit has not yet stated whether its distinction between independent and embedded proceedings survived *Green Tree.*

through arbitration. Consequently, the Court finds that dismissal is inappropriate, and overrules Apache Bohai's objection.

Conclusion

Accordingly, the Court GRANTS Texaco's motion to compel arbitration, and DENIES the remaining pending motions. The Court will enter an Order staying this case on even date herewith.

Signed this 26th day of March, 2002.

s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX C — RELEVANT STATUTE

9 U.S.C. § 16(a)(3)

§ 16. Appeals

(a) An Appeal may be taken from —

* * *

(3) a final decision with respect to an arbitration that is subject to this title.

* * * *